Supreme Court, U.S.
FILED
JAN 11 1993
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No. 92-984

In The

Supreme Court of the United States

October Term, 1992

THE DAILY GAZETTE COMPANY, INC.,

Petitioner,

v.

RAYMOND A. HINERMAN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER CERTIORARI SHOULD BE DENIED SINCE THE STANDARD OF PROOF FOR FALSITY IS NOT AN ISSUE PROPERLY BEFORE THIS COURT.

II. WHETHER CERTIORARI SHOULD BE DENIED SINCE THIS IS NOT A PROPER CASE IN WHICH TO ELABORATE ON THE STANDARD OF PROOF FOR FALSITY BECAUSE THERE IS NO DISPUTE AS TO "FALSITY" IN THE ORDINARY SENSE. THE PARTIES' ACTUAL DISPUTE IS OVER THE MEANING OF THE EDITORIAL RATHER THAN THE UNDERLYING FACTS OF THE CASE.

III. WHETHER CERTIORARI SHOULD BE DENIED WHERE THE LOWER COURT CONDUCTED AN INDEPENDENT REVIEW ON THE FALSITY ISSUE.

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STATEMENT OF THE CASE

A. Facts

The Respondent, Raymond Hinerman ("Hinerman") finds the statement of the case offered by The Daily Gazette Company, Inc. ("The Gazette") inadequate, particularly with regard to the actual events in question, as distinct from news reports of them. A supplemental statement of facts appears below.

This action arises out of an editorial regarding a fee dispute between Mr. Hinerman and Sam Levin ("Levin"). Mr. Hinerman successfully represented Levin in a workers' compensation claim in West Virginia. Mr. Hinerman had originally represented Levin in his capacity as the attorney retained by Levin's union; when Mr. Hinerman resigned from his position as union counsel, his successor recommended to Mr. Levin that Levin retain Mr. Hinerman privately to complete the claim. The parties entered into a standard contingent fee agreement providing that Mr. Hinerman would receive 20% of all compensation awarded Mr. Levin for a maximum of 208 weeks, the maximum permitted under West Virginia statute.

In the appellate proceedings on the workers' compensation dispute, Mr. Levin was awarded permanent total disability, entitling him to future benefits of $1,162.38 per month for life, and a lump sum for accrued benefits of $19,782.38.

Mr. Levin had initially authorized Mr. Hinerman to receive his portion of the fee directly from the workers' compensation commissioner as the benefits were paid

out. Mr. Levin secretly notified the workers' compensation commissioner that he was revoking the authorization to pay the fee directly to Mr. Hinerman, but never notified Mr. Hinerman of that fact and, indeed, kept him ignorant of the change in authorization. When Mr. Hinerman found out about the secret revocation of the authorization, he demanded payment directly from Levin. After repeated demands for payment failed, Mr. Hinerman brought suit in West Virginia circuit court for the fees due.

Mr. Levin failed to make a proper response to the complaint, and a default judgment was entered. Levin was given 10 days in which to present a bona fide defense, and a detailed evidentiary hearing was held with respect to the facts of the case and the ability of Levin to present a bona fide defense. At the conclusion of the hearing, at which Levin was represented by an attorney, the West Virginia circuit court affirmed the default judgment order. The order provided that Mr. Hinerman was entitled immediately to 20% of all workers' compensation payments already paid to Mr. Levin and that 100% of Mr. Levin's periodic payments were to go to Mr. Hinerman until that amount was satisfied. Thereafter, Mr. Hinerman was to receive 20% of the periodic payments, until the maximum total of 208 weeks' worth of an award had been received. The 20% contingent fee applied to only 208 weeks of an award that would last for Levin's lifetime. At trial the evidence was that the lifetime value of the award exceeded $300,000. Thus, the actual percentage of the total award taken under the contingent fee agreement would be approximately 4%.

Levin appealed the foregoing order by Judge Tsapis (the "Tsapis Order") to the West Virginia Supreme Court. The petition for appeal filed by Levin's attorney (the "Levin petition") was the catalyst for some news articles and the editorial that is the basis for this defamation action. Although Mr. Hinerman never conceded that any of the articles were accurate, he elected to litigate only with respect to the editorial published by the Gazette.

In all material respects, the Supreme Court of Appeals of West Virginia upheld the Tsapis' order, in a published decision: *Hinerman v. Levin*, 172 W. Va. 777, 310 S.E.2d 843 (1983). In particular, the court expressly found the contingent fee agreement enforceable and proper.

Although the Levin petition did not present a balanced recitation of the factual background, it expressly revealed that the Tsapis order had awarded Hinerman only the permitted contingent fee and that the 100% levy on the monthly proceeds would continue only until the amount in arrears (due on the prior $19,000 lump sum award and intervening monthly payments) had been cleared.

The Gazette's editorial, which is given in full in the appendix to the petition for certiorari, made no mention of the actual portion of the compensation award received by Mr. Hinerman, but instead stated that the petition "involves a sick immigrant miner who won disability payments, but his lawyer took every penny. . . . " App. at 85a. The editorial also repeated a previously published charge against Judge Tsapis, and stated:

> [S]he once hosted a party at which crooked lawyers under prison sentence or indictment were

> hailed as heroes. The Judicial Inquiry Commission found nothing wrong with her conduct then. Still, the Commission should ask why she allowed a lawyer to take all the public money granted to an impoverished ex-miner too sick to work.

App. at 86a.

The editorial was written by James Haught, a senior assistant to the publisher of the Gazette. Mr. Haught was personally acquainted with Mr. Hinerman, had relied upon him as a source in earlier stories regarding corruption in Mr. Hinerman's area of West Virginia, and knew that Mr. Hinerman had no connection to the corrupt lawyers referred to in the editorial's statements mentioning Judge Tsapis. Mr. Haught stated at trial that he personally considered Mr. Hinerman truthful. Mr. Haught further testified that he was sufficiently "surprised" by the allegations against Mr. Hinerman to send a reporter to "double-check" the accuracy of the allegations. He did not, however, make any effort to check with Mr. Hinerman before publishing the editorial.

B. The Opinions Below

The full text of the opinion of the West Virginia Supreme Court, written by Justice Neeley, and the text of the dissenting opinion by Justice Miller, are found in the appendix to the petition for certiorari. The opinion of the court expressly acknowledges the duty of the court to "make an independent evaluation of the facts to determine whether the jury's verdict was correct and liability can be imposed upon a media defendant." App. at 30a-31a. The court quoted this Court's statement that a

reviewing court must "examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *Id.* (quoting *New York Times Co.*, 376 U.S. at 385). The court held:

> We have independently reviewed the factual record and conclude that the jury was correct in determining that there was clear and convincing evidence that the writer of the editorial, Mr. Haught, at the time the editorial was written, either knew *that the impression of dishonesty and unethical conduct that the editorial intentionally conveyed was false*, or that Mr. Haught published the editorial with a subjective appreciation that, *at least*, he was recklessly disregarding the truth.
>
> App. at 34a (initial emphasis added, emphasis in original as to "at least").

With respect to the primary defenses raised by the Gazette, the opinions of both the majority and the dissenting justices were in substantial agreement. The opinion of the court noted that the "*Gazette's* most important argument on appeal is that even though its editorial was both false and defamatory, the *Gazette* enjoyed two privileges that make the paper immune from liability." App. at 33a. The court noted that the first privilege asserted was that of fair comment, and the second was "the privilege to report official proceedings or public meetings." App. at 33a-34. The dissent noted that "the controlling issue in the case [is] whether the *Gazette* is privileged against a libel suit because of its right to fairly and accurately report on official proceedings." App. at 49a. Despite near agreement on the issues, the majority opinion and dissenting opinion reached different conclusions on the fair

comment question. The majority opinion's analysis is summarized in the following paragraph:

> Although we recognize the privilege of fair comment and the privilege to report official proceedings, we do not accept the Gazette's argument that it may shuffle the two privileges to create an editorial that is primarily a recitation of alleged facts where the reader is led to believe that the editorial writer believes the reported unsubstantiated facts, which are indeed untruths or half-truths. A regular news account that sets forth pleadings – notwithstanding that they are entirely one-sided – gives at least some notice to the reader that unsubstantiated allegations are being reported. Similarly, an article appearing on the editorial page that is derogatory, derisive or generally abusive, without alleging or implying any supporting facts, gives fair warning that the article is simply the editorial writer's opinion. However, when unsubstantiated allegations are so combined with strongly partisan opinion that the reader is led to believe that the editorial writer has access to undisclosed defamatory facts that lead him to believe the allegations he is reporting from a court proceeding are correct, the bounds of permissible behavior are overstepped.

App. at 34a.

In addition to the issues raised by the Gazette's appeal, both the majority and the dissenting opinions discussed the cross-appeal of Mr. Hinerman, challenging the trial court's ruling that he was a public official. The majority's analysis occupies four pages of the appendix

(44a-48a), and is concluded by the holding that Mr. Hinerman was not a public official, because his positions did not rise to that level, and because the Gazette's editorial made no mention of those positions. In conclusion, the opinion for the court stated: "Consequently, should this case be retried, we hold that it must be retried under the negligence standard that applies to the libel of a private individual." App. at 48a. The dissent rejected this conclusion. App. at 74a.

SUMMARY OF ARGUMENT

Petitioner, asks this Court to grant certiorari to resolve interrelated questions regarding the burden of proof imposed by the First Amendment as to the falsity element of a defamation action. The petition should be denied for the following reasons:

1. The Gazette failed to present an argument regarding the proper standard of proof for falsity before the West Virginia Supreme Court and the court, accordingly, did not pass upon this issue.

2. The Gazette incorrectly assumes that Hinerman is a public official for the purposes of its petition. However, the West Virginia Supreme Court of Appeals specifically held that Hinerman is a private figure to which the heightened protections of *New York Times v. Sullivan*, 376 U.S. 254 (1964) would not apply. This holding is not challenged by the Gazette in its petition is, accordingly, waived.

3. Had the issue of the proper standard of proof for falsity not been waived, this case would not allow any meaningful clarification on that point. There is no dispute with regard to truth or falsity in a meaningful sense, and the Gazette's references to falsity as an issue are misleading. The dispute in this case concerns the "meaning", "gist", or "sting" of the statements published by the Gazette. Thus, even if this Court determined that clarification was required on the burden of proof for falsity in libel cases, this case does not present an appropriate vehicle for such a clarification.

4. This case is an inappropriate one for certiorari because the Gazette is clearly wrong in its claim that the West Virginia Supreme Court of Appeals failed to conduct a constitutionally required independent review. The West Virginia Supreme Court decision evidences that the court did, in fact, conduct just such an independent review.

ARGUMENT

I. CERTIORARI SHOULD NOT BE GRANTED SINCE THE STANDARD OF PROOF FOR FALSITY IS NOT AN ISSUE PROPERLY BEFORE THIS COURT.

A. The Gazette Waived, Before The West Virginia Supreme Court, Any Argument As To The Proper Standard Of Proof For Falsity

It is a well-settled rule that this Court will not consider arguments "not pressed or passed upon below." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 217 (1990). *See also Youakim v. Miller*, 425 U.S. 231 (1976) (per curiam); *Clark v.*

Jeter, 486 U.S. 456, 459 (1988) (holding, upon review of the record, that party did not "adequately present" pre-emption claim to state court).

Contrary to the claim in its petition, the Gazette failed to present any argument regarding the proper standard of proof as to falsity to the Supreme Court of Appeals of West Virginia. Furthermore, the decision of the West Virginia Supreme Court did not "pass upon" or address in any fashion this "issue".

The Gazette's petition cites two portions of its brief to the West Virginia Supreme Court purportedly raising the issue of the burden of proof. Petition at 6, n.5. The first citation is to footnote 3 of the appellate brief, the full text of which is as follows:

> The United States Supreme Court increasingly has described the element of substantial falsity as an essential component of actual malice, e.g., *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419 (1991) (June 20, 1991) (even manufacturer [sic] quotations representing "deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposed [sic] of *New York Times Co. v. Sullivan* . . . unless the alteration results in a material change in the meaning conveyed by the statement." Slip opinion at 13.
>
> Petitioner submits that the issue of substantial falsity cannot be divorced from the broader question of actual malice, and that both elements should be judged by a "clear and convincing" evidence standard.

In this passage, there is but a single sentence which relates to the issue of the burden of proof, and it contains not the slightest supporting argument.

The second citation in the Gazette's petition refers to pages 33-42 of its appellate brief. These pages comprise a section of the brief entitled "The Factual Assertions in the Editorial Are Substantially True." This section of the brief consists almost entirely of an extended discussion of the facts of the case. The section is entirely devoid of reference to the proper standard of proof for falsity.

The decision of the West Virginia Supreme Court is wholly without any reference[1] to the proper burden of proof for falsity, and it is obvious from the court's silence that it did not consider the question to have been adequately raised or argued by the Gazette.[2] The question simply was not passed on by that court, nor did the Gazette "press" the issue.

The rule in West Virginia is that an assignment of error that is not briefed or argued is waived. *Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374, 379 (1981). This Court has long held that it will not address questions deemed waived by state courts under their procedural rules. *Beck v. Washington*, 369 U.S. 541, 553 (1962) (holding that single sentence in brief to Washington Supreme

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[1] The reply brief of Mr. Hinerman before the West Virginia court is, of course, utterly silent on the supposed issue of what the correct burden of proof is regarding falsity.

[2] Indeed, it is worth noting that even the dissenting justices made no mention of the arguments now being raised in this Court. Even the dissenters perceived no issue as having been raised on the burden of proof issue.

Court would be considered a waiver of the point by that court; hence, under "unbroken line of precedent" Supreme Court could not entertain question) (citing cases). There is, therefore, no basis on which to reach the burden of proof issue the Gazette attempts to raise in its petition.

B. Imposing On A Private Figure Plaintiff The Higher Burden Sought By The Gazette Would Require Overruling *Gertz*, Which Is Not An Argument Made In The Petition

The Gazette contends that a heightened standard of proof, such as that applicable to the actual malice determination required by *New York Times v. Sullivan*, should be applied to proof of falsity. However, since Mr. Hinerman was held by the West Virginia Supreme Court to be a private individual, there is no basis for the imposition of a heightened constitutional standard as required in cases where the plaintiff is a public official or public figure.

This Court has continually recognized the important distinctions between public and private individuals who have been injured by defamatory falsehoods. Public figures enjoy far greater access to the channels of effective communication and have a better chance to counter defamatory remarks than private individuals. *Gertz v. Robert Welch*, 418 U.S. 323 (1974). This Court has recognized that private figures are more vulnerable to the ill effects of defamation, and that there is a greater state interest in protecting them. Given the inherent differences between public and private defamation plaintiffs, the Court has constructed different standards of liability

for the defamation of public and private individuals. *Gertz*, 418 U.S. 323.

Although the underlying case was tried on a public official theory, Mr. Hinerman cross-appealed the trial court's ruling that he was a public official. The West Virginia Supreme Court of Appeals reversed the trial court determination and held that Hinerman was not a public official or public figure, and that, in any retrial, the case should be tried on a negligence theory. App. at 44a.[3]

In its petition, the Gazette did not request review of the West Virginia court's holding as to Mr. Hinerman's status as a private figure. Rule 14.1(a) of the Rules of this Court clearly provides that "[o]nly questions set forth in the petition, or fairly included therein, will be considered by the Court." Because the Gazette has failed to contest this holding in its petition, the Court may not properly consider the issue. *Yee v. City of Escondido, California*, 60 U.S.L.W. 4301 (1992); *Berkemer v. McCarty*, 468 U.S. 420 (1984).

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[3] The court stated:
Finally, the plaintiff cross-assigns error to the circuit court's determination that by virtue of his position as an appointed municipal judge, his membership on the West Virginia Racing Commission, and his membership on the Board of Governors of West Virginia State Bar, the plaintiff is a "public official." Although resolution of this issue is not necessary for our decision in this appeal, should a retrial become necessary, a resolution of this issue will be important. Consequently, we hold that under applicable First Amendment principles, Mr. Hinerman is not a public official or public figure for the purposes of this defamation action.

The Gazette asks this Court to consider whether the First Amendment requires falsity to be established by the same clear and convincing evidence standard applicable to the actual malice standard of *New York Times*. The Gazette's argument assumes, incorrectly, that Hinerman is to be considered a public official for the purposes of its argument.

As noted above, in *Gertz* this Court recognized that private individuals are more vulnerable to injury and more deserving of recovery than public officials and public figures. Therefore, the Court concluded that "the states should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." *Gertz*, 418 U.S. at 345-346. The Court went on to hold that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* at 347.

The Gazette has not asked this Court to reconsider the *Gertz* decision, nor has it argued that more exacting standards need to be applied to private figures such as Mr. Hinerman. The Gazette has made no effort to brief or argue the question of whether the such heightened standards should be applied to private figures on the facts of this case. It would be improper for this Court to take up this question absent proper development in the courts below. These issues were neither briefed nor argued below, and are not ripe for review by this Court. *Springfield v. Kibbe*, 480 U.S. 257 (1987).

II. THIS IS NOT A PROPER CASE IN WHICH TO ELABORATE ON THE STANDARD OF PROOF FOR FALSITY BECAUSE THERE IS NO DISPUTE AS TO "FALSITY" IN THE ORDINARY SENSE. THE PARTIES' ACTUAL DISPUTE IS OVER THE MEANING OF THE EDITORIAL RATHER THAN THE UNDERLYING FACTS.

Libel cases where there exist disputed issues as to truth or falsity of alleged defamatory statements typically involve disputes as to the actual state of the underlying facts. An example of this type of dispute is illustrated by *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989). In that case, the parties hotly disputed whether the substance of the statements at issue were true. The plaintiff in *Harte-Hanks* had been accused of offering favors to grand jury witnesses in order to procure charges against a staff member of the plaintiff's political opponent. There was a direct contradiction between two grand jury witnesses as to whether any blandishments had been offered by the plaintiff. It was in this context that this Court noted "some debate as to whether the element of falsity must be established by clear and convincing evidence." *Id.* at 661, n. 2.

In the present case, there is no dispute as to the state of facts against which the Gazette's editorial should be measured. One may search the Gazette's petition in vain for any analysis of disputed underlying facts against which to measure the truth of the editorial. The actual substance of the Gazette's position is summarized in two statements: "a publication such as the editorial at issue in this case, *which conveyed an essentially truthful message*, is

not actionable as a matter of federal constitutional law"; and "[there] must be some falsity that 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' "[4] Petition at 12-13 (*quoting Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2433 (emphasis added). As in *Masson*, the primary dispute was over the meaning of the statements and their effect on the reader. On this issue, there is no need for clarification by this Court.

Whether a defamatory statement is sufficiently far from the truth to support a constitutionally permissible judgment has traditionally been analyzed by this Court as part of the "actual malice" determination – *i.e.*, determining whether the publication could have been made in reckless disregard of truth or falsity. *Time, Inc. v. Pape*, 401 U.S. 279 (1971) (holding that the magazine's recounting of

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[4] The Gazette also relies heavily upon the opinion of the dissenting justices who, the Gazette claims, were the only ones to undertake "independent appellate review." Petition at 11. The Gazette's petition sets forth its position on the falsity question by quoting the following passage from the dissent:

> There is no question that the news article and the editorial stated Hinerman's attachment took 100 percent of Levin's compensation payments. Thus, while the attachment existed, Levin did not receive one penny of his compensation award. While lawyers may quibble over how long this period of no payments would last for Mr. Levin, common sense would compel the conclusion that during this period, Mr. Levin received nothing. *This was the obvious meaning of the editorial.* It was not false in any material regard, and, as a *consequence*, Mr. Hinerman, even as a private citizen, is not entitled to recover. . . .

Petition at 8, quoting App. 74a-75a (emphasis added).

an official report, and failure to note that parts of the report were taken from allegations on a civil complaint, not sufficient to support actual malice finding); *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419 (1991) (discussing whether six statements falsely attributed as direct quotations of plaintiff, varied sufficiently from quote of actual statements to raise a jury question).

Masson, a case relied upon heavily by the Gazette in its petition, is instructive of the proper analysis. There two types of "falsity" were at issue. The corporate defendants, the *New Yorker Magazine*, and a publishing company, had both published an article that was highly uncomplimentary to the plaintiff, Masson. The article contained numerous quotations from the plaintiff, some of which were not contained in taped interviews. The plaintiff claimed that certain of the quoted statements had never been made. The defendants asserted that the statements had been made or, alternatively, that the published statements were sufficiently close in meaning to actual statements to bar any recovery.

The first type of falsity determination involved a straightforward factual question of whether the statements had been made. There was no dispute among the parties that a genuine issue of fact existed as to that matter. The defendants nevertheless obtained summary judgment in their favor, based upon the finding of the lower court that the statements were "substantially true," even if not actually made. *Id.* This second analysis of "falsity" – judging whether the meaning of the statements varied sufficiently from the facts – was reviewed by the

Court *de novo* under the traditional *New York Times* standard of "actual malice," which is reckless disregard for truth or falsity.

> The constitutional question we must consider here is whether, in the framework of a summary judgment motion, the evidence suffices to show that respondents acted with the requisite knowledge of falsity or reckless disregard as to truth or falsity. This inquiry in turn requires us to consider the concept of falsity; for we cannot discuss the standards for knowledge or reckless disregard without some understanding of the acts required for liability. We must consider whether the requisite falsity inheres in the attribution of words to the petitioner which he did not speak.
>
> . . . . .
>
> We must determine whether the published passages differ materially in meaning from the tape recorded statements so as to create an issue of fact for a jury as to falsity.

Id. at 2431, 2435.

As the foregoing passage illustrates, this Court has clearly held that a finding of reckless disregard of truth or falsity requires an assessment of the meaning of a statement, and that an assessment of a statement's meaning is a necessary, but preliminary, step in determining whether a *question* of falsity exists.[5]

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[5] The West Virginia Supreme Court in fact made such an assessment and found, clearly and convincingly that the variance between the editorial's statements and the undisputed facts were great enough to show reckless disregard of the truth.

This type of assessment of falsity which depends on determining a statement's meaning must already be reviewed by appellate courts *de novo*, under the *New York Times* clear and convincing standard. This is merely part of the well-recognized duty of an appellate court "to be sure that the speech in question actually falls within the unprotected category." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984). There is, therefore, no unresolved question on "falsity" in this sense that would require granting certiorari.

Falsity of the first type – factual falsity – is the only type of falsity as to which there is a split in the circuits. The two cases noted by this Court[6] as evidencing a divergence of opinion both involved factual falsity. *See Firestone v. Time, Inc.*, 460 F.2d 712 (5th Cir.) *cert. denied*, 409 U.S. 875 (1972) (factual dispute as to whether wife had persuaded private detective to leave employment of firm retained by husband) and *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir.) *cert. denied*, 396 U.S. 1049 (1970) (factual dispute as to whether Senator suffered from paranoia).

In the present case there is no dispute regarding the underlying facts of the Hinerman/Levin lawsuit. Both parties to the present action are in total agreement as to the contents of the Tsapis order, the contents of the Levin petition to the West Virginia Supreme Court, and the pertinent actions of Mr. Hinerman. The Gazette's reference to a falsity issue is misleading to the Court, because there is no dispute as to the underlying facts.

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[6] *Harte-Hanks*, 105 L.Ed. 2d at 573, n. 2.

III. CERTIORARI SHOULD BE DENIED WHERE THE LOWER COURT CONDUCTED AN INDEPENDENT REVIEW ON THE FALSITY ISSUE.

The Gazette claims that the West Virginia Supreme Court of Appeals made no independent review as required by constitutional law. As previously discussed, the only disputed questions relating to falsity in this case concerned the *meaning* of the editorial. The West Virginia Supreme Court extensively discussed the facts of the case, App. at 10a-19a, and the court's decision is replete with excerpts from the trial transcript in support of its holding. The decision itself clearly evidences that an independent analysis and review actually did take place.

> We have independently reviewed the factual record and conclude that the jury was correct in determining that there was clear and convincing evidence that the writer of the editorial, Mr. Haught, at the time the editorial was written, either knew *that the impression of dishonesty and unethical conduct that the editorial intentionally conveyed was false,* or that Mr. Haught published the editorial with a subjective appreciation that, *at least,* he was recklessly disregarding the truth.

App. 31a (initial emphasis added; emphasis in original is to the phrase "at least").

After the foregoing passage, the court's opinion then summarized, in the next one and one-half pages, the evidence that the article was published with knowledge of, or reckless disregard, for its truth or falsity.

Furthermore, the West Virginia court explicitly stated that a reviewing court is obligated to make an independent

review to determine whether liability could properly be imposed. App. at 30a, *citing Harte-Hanks*, 491 U.S. 657 and *New York Times*, 376 U.S. 254. In fact, the court quoted extensively from the *Harte-Hanks* decision, including the portion of the opinion stating that "the reviewing Court must " 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." ' " App. at 31a, *quoting New York Times Co.*, 376 U.S. at 285 (quoting *Pennekamp v. Florida*, 328 U.S. 331 (1946)). The Gazette's claim that there was no independent review is never supported in the petition by anything other than an assertion that the state court's decision was wrong and, therefore, the court could not have conducted any independent review. This unsupported assertion is belied by even a casual review of the decision.

CONCLUSION

The Gazette's petition raises an issue which was not preserved before the West Virginia Supreme Court of Appeals, ignores the implications of the West Virginia court's holding with regard to the public official/private figure issue and attempts to manufacture constitutional issues requiring this Court's review where none exist.

Therefore, based upon the foregoing, Respondent Raymond A. Hinerman respectfully requests that the Gazette's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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